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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 HERNAN O'RYAN CASTRO,) No. 07-CV-5775-PJH
 14 Petitioner,) E-FILING CASE
 15 v.) ANSWER AND OPPOSITION TO
 16 ROBERT E. McFADDEN, Western) PETITION FOR WRIT OF HABEAS
 17 Regional Director, Federal Bureau of) CORPUS
 18 Prisons,)
 19 Respondent.)

20 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

21 Through a petition for writ of habeas corpus (“Petition”), petitioner Hernan Castro
 22 (“Petitioner”) seeks to enjoin the Bureau of Prisons (“BOP”) from enforcing the Offender
 23 Subsistence Collection program (hereinafter “Subsistence Program”), which “promotes financial
 24 responsibility and offset[s] the cost of incarceration” by requiring inmates assigned to a Residential
 25 Reentry Center (“RRC”) to pay 25% of their gross income to the RRC.¹

26
 27 ¹The “Offender Subsistence Collection” program is a Bureau of Prisons correctional
 28 program, and is set forth in BOP Program Statement 7300.09, *Community Corrections Manual*,

1 Respondent opposes this Petition for several reasons. First, this Petition should be dismissed
 2 because Petitioner failed to exhaust administrative remedies, which is a prerequisite to bringing suit.
 3 *See Porter v. Nussle*, 122 S.Ct. 983, 922 (2002). Second, this Petition should be dismissed because
 4 the Subsistence Program is a valid correctional program that was implemented pursuant to 18 U.S.C.
 5 § 4001(b)(2) to provide for the “proper government, discipline, treatment, care, rehabilitation, and
 6 reformation” of the inmate. Third, Petitioner asserts exceptions that are not applicable to the
 7 Subsistence Program.

II. FACTS

A. Background Information On Petitioner

8 On July 14, 1992, Petitioner received a 240 month sentence for violations of 21 U.S.C. § 846,
 9 conspiracy to possess with the intent to distribute cocaine, and 21 U.S.C. §§ 960 and 963, conspiracy
 10 to import into U.S. from outside territorial limits, multi-kilo quantities of cocaine hydrochloride.
 11 *See Exhibit 1 to Beakey Declaration*. From November 9, 2005, to November 11, 2007, Petitioner
 12 was at the Satellite Prison Camp (“SCP”) at Leavenworth, Kansas. *See Exhibit 2 to Beakey*
 13 Declaration. On November 11, 2007, Petitioner was furlough transferred from SCP Leavenworth
 14 to a Residential Reentry Center (“RRC”) in San Francisco, which means he was permitted by the
 15 BOP to transport himself to the RRC. *See Beakey Declaration*. Petitioner arrived at the San
 16 Francisco RRC on November 13, 2007, where he is currently housed. *Id.* Petitioner’s projected
 17 release date is May 10, 2008, which includes a sentence reduction pursuant to 18 U.S.C. §
 18 3621(e)(2)(B), which is contingent on satisfactory completion of the transitional drug abuse program
 19 at the RRC, and so long as he abides by other conditions of the Residential Drug Abuse Treatment
 20 Program (“RDAP”), e.g., no use of illegal drugs. *Id.*

B. The RRC and Petitioner’s Participation in the Subsistence Program

21 A RRC is more commonly known as a halfway house, and was formerly known in the BOP
 22 as Community Corrections Centers. *See Beakey Declaration*. Placement in a RRC towards the end
 23 of an inmate’s sentence, helps them transition back to the community. *Id.* All inmates must agree
 24

25 at chapter 5, pages 30-31. *See Exhibit 3 to Declaration of Kim Beakey (“Beakey Declaration”).*

1 to participate in the Subsistence Program, which is set forth in Program Statement (“P.S.”) 7300.09,
 2 *Community Corrections Manual*, Chapter 5, pgs 30-31. *See Exhibit 3 to Beakey Declaration.* It
 3 states in pertinent part:

4 To promote financial responsibility and offset the cost of incarceration, the Bureau
 5 requires inmates to make subsistence payments to contractors. Contractors shall
 6 collect 25% of each employed inmate’s weekly gross income, not to exceed the daily
 7 inmate-day rate.
Id.

8 On June 21, 2007, Petitioner signed the Community Based Program Agreement, which states
 9 in pertinent part:

10 I understand that while a resident of a community corrections center or work release
 11 program I will be expected to contribute to the cost of my residence through
 12 payments to the contractor and I agree to make such payments. I understand that
 13 failure to make payments may result in my removal from a community-based
 14 program.

15 *See Exhibit 4 to Beakey Declaration.*

16 Accordingly, Petitioner has been provided subsistence payment instructions from the
 17 Contractor who currently operates his designated RRC. *See Exhibit 5 to Beakey Declaration.*

18 **C. Petitioner’s Administrative Remedies**

19 On October 2, 2007, Petitioner filed a request for administrative remedy, challenging the
 20 requirement that he pay subsistence to the RRC. *See Exhibit 1 to Vickers Declaration.* However,
 21 Petitioner believed the subsistence payment requirement emanated from a Cost of Incarceration Fees
 22 (“COIF”) authority, and asserted he was exempt from paying a COIF, and that it was otherwise
 23 unconstitutional and illegal. *Id.* On November 5, 2007, Warden Chester explained that the COIF
 24 was unrelated to the subsistence payments, and denied Petitioner’s request to be exempt from
 25 making those subsistence payments. *See Exhibit 2 to Vickers Declaration.*

26 On November 6, 2007, Petitioner appealed and maintained that subsistence payments arose
 27 from COIF-related authorities, and claimed he was accordingly exempt. *See Exhibit 3 to Vickers*
 28 *Declaration.* On December 7, 2007, the North Central Regional Director cited to BOP policy at
 29 Program Statement 7310.04, *Community Corrections Center (CCC) Utilization and Transfer*
 30 *Procedure*, as the authority for the required subsistence payments, and denied Petitioner’s appeal.
See Exhibit 4 to Vickers Declaration; see also Exhibit 6 to Beakey Declaration.

As exhaustion of BOP administrative remedies requires filing a request or appeal and getting a decision at all three levels, Petitioner's failure to complete the last level (appeal to Central Office) indicates he has not yet exhausted his available administrative remedies. *See* Vickers Declaration.

D. The BOP Programs Regarding Costs of Incarceration Fines and Fees, Are Separate From The Offender Subsistence Collection Program

Congress has passed numerous legislation permitting, and in some cases mandating, that an inmate in federal custody assist in paying his cost of incarceration. In some instances the cost of incarceration is to be assessed by the BOP and deposited in the treasury to offset the tax expenditure appropriated for the Federal Prison System. *See* 18 U.S.C. § 3622(c)(2). In other instances the cost is to be assessed by the sentencing court in the form of a fine, and is intended to be punitive in nature. *See* U.S.S.G. § 5E1.2(d)(7). There is also a costs of incarceration fee program that controls when the court neither imposes nor waives the fine. *See* 28 C.F.R. § 505.1. In addition to these congressional mandates, to promote financial responsibility and prepare the inmate for release into the community, the BOP requires inmates to make subsistence payments directly to the RRC contractor. *See* P.S. 7300.09 Chapter 5.13.1; *see also, e.g., Gleave v. Graham*, 4 F. Supp. 2d 163 (W.D.N.Y 1997). Although each of these programs has an independent basis for the assessment and collection of the cost of incarceration, Congress and the BOP have taken steps to ensure that an inmate is not charged duplicative costs.

1. Imposition of Punitive Fines by the Sentencing Court under the Sentencing Reform Act

In 1984, Congress passed the Sentencing Reform Act, which authorized the creation of a list of factors to be considered by the sentencing court in deciding "whether to impose a fine, and the amount, time for payment, and method of payment of a fine." 18 U.S.C. § 3572(a). One of the factors requires the courts to consider "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence." 18 U.S.C. § 3572(a)(6). Although a sentencing court is required to consider the costs of incarceration in imposing a fine, the purpose of the fine is not to reimburse the BOP for the cost of incarceration. Rather, the purpose of the fine is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense ... [and] to afford adequate deterrence to criminal conduct." 18 U.S.C.

§ 3553(a)(2)(A) & (B). In other words, the court-imposed fine is punitive in nature.² See *United States v. Zakhor*, 58 F.3d 464 (9th Cir. 1995) (holding that prior to direct congressional authority to impose a fine for the cost of incarceration, the fine is valid because it serves the purposes of “just punishment and deterrence.”) This fine has been referred to as a Cost of Incarceration *Fine*, which can be confusing due to the similar acronym of the Cost of Incarceration *Fee*, and as a result, is distinguished in BOP policy in P.S. 7300.09, Chapter 5, page 38 (“Note that the Cost of Incarceration Fee, which is imposed by the Bureau, is distinct from the Cost of Incarceration Fine, which is imposed by the courts.”)

2. Imposition of Costs by the BOP under the Sentencing Reform Act

In addition to providing sentencing guidelines for the sentencing court, the Sentencing Reform Act also created rules regarding the post sentence administration of inmates. See 18 U.S.C. § 3622. The Act authorizes the BOP to temporarily release a prisoner from “official detention at [a] penal or correctional facility” for the purpose of “work at paid employment in the community,” provided that “the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all circumstance.” *Id.* Costs under this act are to be collected by the BOP and deposited in the Treasury. *Id.*

3. Imposition of a Cost of Incarceration Fee by the Attorney General

On October 6, 1992, Congress passed a law requiring that the Attorney General “establish

² In addition to considering the cost of incarceration, the sentencing court is also required to consider: 1) the defendant's income, earning capacity, and financial resources; 2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose; 3) any pecuniary loss inflicted upon others as a result of the offense; 4) whether restitution is ordered or made and the amount of such restitution; 5) the need to deprive the defendant of illegally obtained gains from the offense; 6) whether the defendant can pass on to consumers or other persons the expense of the fine; and 7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense. 18 U.S.C. § 3572(a)

and collect a fee to cover the costs of confinement from any person convicted in a United States District Court and committed to the Attorney General's custody." 18 U.S.C. § 4001 at *note* under *Fee to Recover the Cost of Incarceration*. Congress mandated that this fee be "equivalent to the average cost of one year incarceration," and that it should not be collected against inmates that had a fine imposed or waived under the U.S. Sentencing Guidelines. *Id.* The authority to collect this fee was subsequently been delegated to the Director of the BOP. 28 C.F.R. 0.96c. The Director of the BOP is required to "review and determine the amount of the fee not less than annually" and to "publish each year's fee as a Notice in the Federal Register." *Id.* This program is the one commonly known as the COIF, and appears to be the one Petitioner confuses with the Subsistence Program. The COIF is actually referenced in a separate section of P.S. 7300.09 at Chapter 5, pgs 38-39, and has its own Program Statement, 5380.06, entitled, *Cost of Incarceration Fee (COIF)*, which is available at www.bop.gov and BOP inmate law libraries.

4. Offender Subsistence Collection Program

As stated previously, the Subsistence Program is set forth in P.S. 7300.09, *Community Corrections Manual*, Chapter 5, pgs 30-31. "The subsistence program applies to all offenders assigned to community-based programs."³ *Id.* at 30. "An inmate who fails to pay subsistence may have privileges withheld or disciplinary actions may be taken, including termination from the program." *Id.* The Subsistence Program is also referenced in P.S. 7310.04, *Community Corrections Center (CCC) Utilization and Transfer Procedure*, Section 7, page 4:

During their stay, inmates are required to pay a subsistence charge to help defray the cost of their confinement; this charge is 25% of their gross income, not to exceed the average daily cost of their CCC placements. Failure to make subsistence payments may result in disciplinary action.

See Exhibit 6 to Beakey Declaration.

³ As RRC conditions apply to all individuals housed in a RRC, even non-BOP inmates who reside there as a condition of supervision or parole, the Subsistence Program is similarly applicable. *See pages 7-9 of Exhibit 3 to Beakey Declaration.*

1 **III. THIS HABEAS PETITION SHOULD BE DISMISSED BECAUSE PETITIONER
2 FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES**

3 The Prisoner Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought
4 with respect to *prison conditions* under section 1983 of this title, or any other Federal Law, by a
5 prisoner confined in any jail, prison, or other correctional facility until such administrative
6 remedies as are available are exhausted." (Emphasis added) 42 U.S.C. § 1997e(a). The Supreme
7 Court explained the purpose behind the PLRA's exhaustion requirement:

8 Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve
9 the quality of prisoner suits; to this purpose, Congress afforded corrections
10 officials time and opportunity to address complaints internally before allowing the
11 initiation of a federal case. In some instances, corrective action taken in response
12 to an inmate's grievance might improve prison administration and satisfy the
13 inmate, thereby obviating the need for litigation. (Citation omitted). In other
14 instances, the internal review might "filter out some frivolous claims." (Citation
15 omitted). And for cases ultimately brought to court, adjudication could be
16 facilitated by an administrative record that clarifies the contours of the
17 controversy.

18 *Porter*, 122 S.Ct. at 988.

19 Accordingly, there are broad-reaching reasons why exhaustion is required before filing a
20 lawsuit challenging prison conditions. As this Petition challenges the conditions an inmate must
21 agree to abide by before being housed in a RRC, the PLRA applies. *See Porter*, 122 S.Ct. at 992;
22 *see also Jones v. Bock*, 127 S.Ct. 910, 924-925 (2007). Although many courts, including those in
23 this District, have considered the exhaustion argument as a judicial requirement rather than a
24 statutory one (*see Cristoval v. Clark*, 2007 WL 2746742 (N.D. Cal.); *Reyna v. Copenhager*[sic],
25 2007 WL 2504893 (N.D. Cal.); *Felty v. Clark*, 2007 WL 2438337 (N.D. Cal.), at least one court
26 has framed the issue properly: "As exhaustion is required under [case law], the Court need not
27 address [the Government's] argument that exhaustion is also required under the Prisoner
28 Litigation Reform Act because the petition challenges petitioner's 'prisoner conditions.'" *Zavala*

v. Clark, 2007 WL 2705216 (N.D. Cal.), at *1. As challenging the BOP's policy mandating subsistence payments as a condition of his RRC placement is clearly a lawsuit challenging his prison conditions, the PLRA controls and exhaustion is mandatory. *See Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006) ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.")

For purposes of the PLRA, "an action is 'brought' ... when the complaint is tendered to the district clerk, and not when it is subsequently filed." *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir.2006). Prisoners must complete the prison's administrative process, regardless of the relief offered by the process, so long as the administrative process can provide some sort of relief on the complaint stated. *Booth v. Churner*, 121 S.Ct. 1819,1825 (2001).⁴ A "prisoner need not exhaust further levels of review once he has either received all 'available' remedies at an intermediate level or been reliably informed by an administrator that no remedies are available." *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir.2005). The PLRA requires proper exhaustion and a prisoner cannot satisfy the exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal or grievance. *Ngo*, 126 S.Ct. at 2382. As a result, exhaustion of the prison's administrative process must occur prior to bringing suit. *See Vaden*, 449 F.3d at 1050; *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir.2002). Therefore, as Petitioner did not exhaust *all* of his available administrative remedies before filing this lawsuit, and still has not by virtue of still having to complete the appeals process at the Central Office level (*see* Vickers Declaration), this Petition should be dismissed.

⁴ As P.S. 7300.09, Chapter 5, pgs 30-31, allows for inmates to "waive or modify subsistence payments on a case-by-case basis . . . , " there is some form of relief Petitioner could ask for. Although there is no futility exception under the PLRA, the possibility of getting his subsistence payment waived further extinguishes any exception to exhaustion.

1 **IV. PETITIONER IS OBLIGATED TO PAY 25% OF HIS INCOME TO THE RRC**
 2 **UNDER THE BOP'S SUBSISTENCE PROGRAM**

3 **A. The Subsistence Program is a Valid Exercise of the BOP's Mandate to**
 4 **Manage Its Inmate Population**

5 The control and management of Federal penal and correctional institutions is vested in
 6 the Attorney General. 18 U.S.C. § 4001(b)(1). The Attorney General has the authority to
 7 promulgate rules that provide for the “proper government, discipline, treatment, care,
 8 rehabilitation, and reformation” of inmates under his care. *Id.* The BOP, under the direction of
 9 the Attorney General, is charged with, and delegated, the task of managing and regulating the
 10 Federal penal and correctional institutions. 18 U.S.C. §§ 4041 & 4042. Pursuant to this
 11 delegation, the BOP has created the Subsistence Program, which states:

12 To promote financial responsibility and offset the cost of incarceration, the
 13 Bureau requires inmates to make subsistence payments to contractors.

14 Contractors shall collect 25% of each employed inmate's weekly gross income not
 15 to exceed the daily inmate-day rate.

16 Program Statement 7300.09, Ch. 5.13.1.

17 This program is related to the “government, discipline, treatment, care, rehabilitation, and
 18 reformation” of the inmate, and therefore, is within the purview of the BOP’s grant of authority
 19 under 18 U.S.C. §§ 4001(b), 4041 & 4042.

20 **B. Petitioner’s Reliance On Other Costs of Incarceration Provisions Is**
 21 **Misplaced And Inapposite**

22 Petitioner cites various statutes, sentencing guidelines, and federal regulations concerning
 23 fines and fees relating to the costs of incarceration (*see* Petitioner’s Memorandum of Points and
 24 Authorities at 8-10), in an effort to claim exemptions, but these provisions do not concern the
 25 Subsistence Program, the program that currently authorizes the collection of 25% of his gross pay
 26 to the contractor that operates the RRC. P.S. 7300.09 is clear on its face that the Subsistence

Program stands separately as a BOP program, and is implicit that it is created pursuant to the
 1 BOP's general authority to manage its inmates under 18 U.S.C. § 4042. Petitioner did cite to
 2 *Gleave v. Graham*, 954 F.Supp. at 608, which is the only case Respondent could find discussing
 3 the Subsistence Program, which held that the Subsistence Program did not violate a prisoner's
 4 constitutional rights. However, the *Gleave* Court appears to merge the authority for the
 5 Subsistence Program with the authority for the COIF and the imposition of costs under 18 U.S.C.
 6 § 3622 (see *Gleave* at 607-608), which may have prompted Petitioner's misunderstanding.⁵
 7 Accordingly, there is no merit to Petitioner's arguments against the Subsistence Program.⁶

10 V. CONCLUSION

12 Based on the foregoing, Respondent requests an order dismissing this matter for failure to
 13 exhaust available administrative remedies. Alternatively, Respondent requests an order denying
 14 this Petition as the BOP properly exercised its authority under 18 U.S.C. § 4042 to create and
 15 operate the Subsistence Program, and there are no applicable exceptions.

17 Dated: December 14, 2007

Respectfully submitted,
 18 SCOTT N. SCHOOLS
 19 United States Attorney

20 By: _____ /s/
 21 Dennis M. Wong
 22 Special Assistant U.S. Attorney

23 ⁵ As *Gleave* involved a civil rights lawsuit against halfway house employees, and not the
 24 BOP, that may explain the inaccurate facts concerning the Subsistence Program. *Id.* at 603-604;
 25 see also fn. 3 (indicates defendants sought dismissal because BOP was an indispensable party).

26 ⁶ Petitioner's remaining argument challenging the agreement he signed that includes a
 27 provision about the Subsistence Program is equally meritless. The BOP does not contend the
 28 agreement is a contract, as opposed to a notice to Petitioner of the BOP's expectations that he
 must abide by. See Beakey Declaration. As a result, the enforceability of such an agreement is a
 non-issue.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the U.S. Department of Justice, and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

**ANSWER AND OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS
AND DECLARATIONS OF KIM BEAKY AND JENNIFER VICKERS**

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

X **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

PERSONAL SERVICE (BY MESSENGER)

FACSIMILE (FAX) Telephone No.:

to the parties addressed as follows:

Hernan Castro, Reg. No. 73026-011
Taylor Street Center
111 Taylor Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of December, 2007, at Dublin, California.


Terri Nubla, Legal Instruments Examiner